Tan Sri Adam Kadir v Pos Malaysia Bhd & Ors and another suit

HIGH COURT (KUALA LUMPUR) — SUIT NOS S-21NCVC-18 OF 2010 AND S-22NCVC(1)-99 OF 2010
PRASAD ABRAHAM JC
26 JULY 2011

Companies and Corporation — Directors — Appointment — Plaintiff appointed as non-executive chairman of Pos Malaysia Bhd ('PMB') — Articles of association of PMB vesting power to appoint chairman in the special shareholder ie Minister of Finance (Incorporated) — Whether plaintiff may be removed as chairman of PMB by Prime Minister or Minister of Finance or by Government of Malaysia — Whether articles created contract between plaintiff and special shareholder

Contract — Employment contract — Appointment as non-executive chairman of Pos Malaysia Bhd ('PMB') — Articles of association of PMB vesting power to appoint chairman in the special shareholder ie Minister of Finance (Incorporated) — Whether plaintiff may be removed as chairman of PMB by Prime Minister or Minister of Finance or by Government of Malaysia — Whether articles created contract between plaintiff and special shareholder

The second defendant acting for and or behalf of the third defendant had appointed the plaintiff as non-executive chairman of the first defendant. On 17 February 2005, the Minister of Finance II confirmed the plaintiff's appointment effective 1 March 2005 for a period of two years. On 25 March 2008 the Minister of Finance II by way of letter extended the tenure of the plaintiff as the non-executive chairman of the first defendant for a further period of one year effective 1 March 2008. On 3 May 2008, the Prime Minister of Malaysia at that time who was also the Finance Minister wrote to the plaintiff to inform the plaintiff that a new non-executive chairman of the first defendant would be appointed on 1 June 2008. The plaintiff tendered his resignation as a director of the first defendant on 17 June 2008. The plaintiff later attempted to withdraw his resignation contending that his tenure as the non-executive chairman of the first defendant should not have been terminated before 28 February 2009. The plaintiff in the present proceedings claimed that his tenure as chairman of the first defendant was terminated prematurely and this constituted a breach of contract. Amongst the issues raised were: (i) whether there was a contract between the plaintiff and the Ministry of Finance ('MOF') or the Government of Malaysia ('GOM') for the plaintiff's appointment as the non-executive chairman of Pos Malaysia Bhd (PMB)?; and

(ii) whether the MOF or the GOM breached that contract by removing the plaintiff as non-executive chairman of PMB?

Held, dismissing the plaintiff's claim with costs:

(1) To suggest that the second letter of renewal implied a contractual duty to continue the plaintiff's appointment until February 2009 was not borne out by the contemporaneous letters. The claim of breach of contract failed (see para 6).

(2) The articles of association of the first defendant in particular article 129 vested the power to appoint a chairman in the special shareholder. Special shareholder meant the Minister of Finance. As long as the Minister of Finance (Incorporated) Act 1957 is in force, the Minister acts as a corporation and any contractual privity (if at all) must be with the corporation not the Minister or the GOM (see para 7).

(3) If ever there was a contract between the plaintiff as pleaded, it should be with the Minister of Finance Incorporated (MOF Inc) and since the corporation was not a party in this suit, the plaintiff's claim should stand dismissed (see para 12).

(4) A shareholder cannot in law be capable of creating contractual liability with the plaintiff in connection with the plaintiff's appointment as chairman and director of the first defendant. The power to appoint a chairman under the articles does not create a contract between the plaintiff and the special shareholder. Hence the questions were answered in the negative (see para 13).

[Bahasa Malaysia summary

Defendan kedua bertindak untuk dan bagi pihak defendan ketiga telah melantik plaintif sebagai pengerusi bukan eksekutif defendan pertama. Pada 17 Februari 2005, Menteri Kewangan II mengesahkan pelantikan plaintif berkuat kuasa mulai 1 Mac 2005 untuk tempoh dua tahun. On 25 Mac 2008 Menteri Kewangan II melalui surat melanjutkan tempoh memegang jawatan plaintif sebagai pengerusi bukan eksekutif defendan pertama untuk tempoh lanjut selama satu tahun mulai 1 Mac 2008. Pada 3 Mei 2008, Perdana Menteri Malaysia pada masa tersebut yang juga adalah Menteri Kewangan menulis kepada plaintif untuk memberitahu plaintif bahawa pengerusi baru pengerusi bukan eksekutif defendan pertama akan dilantik pada 1 Jun 2008. Plaintif meletakkan jawatannya sebagai pengarah defendan pertama pada 17 Jun 2008. Plaintif kemudiannya mencuba untuk menarik balik peletakan jawatannya dengan berhujah bahawa pemegangan jawatannya sebagai pengerusi bukan eksekutif defendan pertama patut tidak ditamatkan sebelum 28 Februari 2009. Plaintif dalam prosiding ini menuntut bahawa pemegangan jawatannya sebagai pengerusi defendan pertama ditamatkan secara pramatang dan ini membentuk kemungkiran kontrak. Di antara isu-isu yang dibangkitkan: (i)

sama ada terdapat kontrak di antara plaintif dan Kementerian Kewangan ('KK') atau Kerajaan Malaysia ('KM') untuk pelantikan plaintif sebagai pengerusi bukan eksekutif Pos Malaysia Bhd (PMB)?; dan (ii) sama ada KK atau KM memungkiri kontrak dengan menyingkirkan plaintif sebagai pengerusi bukan eksekutif PMB?

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Untuk mencadangkan bahawa surat kedua pembaharuan tersirat duti kontrak untuk meneruskan pelantikan plaintif sehingga Februari 2009 tidak ditunjukkan oleh surat-surat semasa tersebut. Tuntutan kemungkiran kontrak oleh itu gagal (lihat perenggan 6).

(2) Tataurusan persatuan defendan pertama khususnya artikel 129 meletakhakkan kuasa untuk melantik pengerusi di dalam pemegang saham khas. Pemegang saham khas bermaksud Menteri Kewangan. Selagi Akta Menteri Kewangan (Pemerbadanan) 1957 masih berkuat kuasa, Menteri bertindak sebagai perbadanan dan apa-apa priviti kontrak (jika ada) mesti disempurnakan dengan perbadanan bukan Menteri atau KM (lihat perenggan 7).

(3) Jika terdapat kontrak di antara plaintif seperti yang diplidkan, ia patut disempurnakan dengan Menteri Kewangan Pemerbadanan dan memandangkan perbadanan bukan pihak dalam tindakan ini, tuntutan plaintif patut kekal ditolak (lihat perenggan 12).

(4) Pemegang saham tidak dari segi undang-undang berkebolehan untuk membentuk liabiliti kontrak dengan plaintif berhubung dengan pelantikan plaintif sebagai pengerusi dan pengarah defendan pertama. Kuasa untuk melantik pengerusi di bawah tataurusan persatuan tidak membentuk kontrak di antara plaintif dan pemegang saham khas. Maka soalan-soalan dijawab dalam negatif (lihat perenggan 13).]

Notes

For cases on appoinment, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 164–169.

For cases on employment contract in general, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4168–4220.

Cases referred to

International Railway Co v Niagara Parks Commission [1941] 2 All ER 456, PC (refd)

Tamlin v Hannaford [1949] 2 All ER 327, CA (refd)

Tenaga Nasional Bhd v Manfield Development Sdn Bhd & Anor [2010] MLJU 1831, CA (refd)

Legislation referred to

Minister of Finance (Incorporation) Act 1957 ss 3, 4

Mohamed Hanipa Suhana (Mohamed Hanipa & Assoc) for the plaintiff.
Nithin Nadkarni & R Himahlini (Lee Hishammuddin Allen & Gledhill) for the defendant.
Shamsul Bolhassan (Attorney General's Chambers) for the second and third defendants.

Prasad Abraham JC:

[1] This case arose out of a claim by the plaintiff, the former non-executive chairman of the first defendant against the defendants. The plaintiff case was registered as Suit No S-21NCVC-18 of 2010 arising out of the facts of this suit ('NCVC18'). The plaintiff also filed a suit against Tan Sri Dato' Azman bin Hj Mokhtar which was registered as S-22NCVC(1)2–99 of 2010 arising also from the same facts. As both cases arose from the same facts, both cases were to be heard together ('NCVC-99').

[2] The plaintiff in NCVC18 in his statement of claim pleads that the second defendant acting for and or behalf of the third defendant appointed the plaintiff as non-executive chairman of the first defendant from the 1 March 2005 by way of a letter with the terms and conditions attached. The second and third defendants by way of a letter dated 25 March 2008 extended the plaintiff's term as chairman of the first defendant for a further year. However in breach of their contractual obligations, the tenure of the plaintiff as chairman of the first defendant was terminated prematurely and this constituted a breach of contract. The plaintiff also relies on the doctrine of expectation and raises several constitutional arguments (see p 6 to p 12 bundle A statement of claim). The defendants rely on their respective defences filed herein.

[3] As the facts in NCVC18 are largely undisputed and the arguments centered on points of law, all parties decided to proceed with the trial by dispensing with oral evidence. By consent parties framed issues of law to be decided by this court marked D. The court commends the approach of all counsel in this case to facilitate the effectual disposal of this matter. I set out the issues to be tried.

(1) Whether there is a contract between the Plaintiff and the Ministry of Finance (MOF) and/or the Government of Malaysia (GOM) for the Plaintiff's appointment as the Non-Executive Chairman of Pos Malaysia Berhad (PMB)?

(2) Whether the Plaintiff was appointed as the Non-Executive Chairman of PMB by MOF/GOM or the Minister of Finance Incorporated.

(3) Whether the MOF and/or the GOM is estopped from alleging that the Plaintiff was appointed as the Non-Executive Chairman of PMB by the MOF Inc.

(4) If the answer to question 1 is in the positive, whether the MOF and/or the GOM breached that contract by removing the Plaintiff as Non-Executive Chairman of PMB?

(5) If the Court finds that there was a contract between GOM an/or the MOF on the one part and the Plaintiff on the other part, and that contract was breached by the GOM/MOF then —

(a) Suit No S-21NCVC-18-2010 shall be remitted to the Senior Assistant Registrar to assess what, if any, damages were suffered by the Plaintiff as a result of his termination or dismissal or removal as the Non- Executive Chairman of PMB; and

(b) Suit No S-22NCVC(1)2-99-2010 be set down for trial.

(6) If the Court finds that there was no contract between the GOM and/or the MOF on the one part and the Plaintiff on the other part, or that the contract was not breached by the GOM/MOF then —

(a) Suit No S-21NCVC-18-2010 be dismissed with costs; and

(b) The claim by the Plaintiff against Tan Sri Dato' Azman bin Hj. Mokhtar vide Suit No S-22NCVC(1)2-99-2010 be dismissed with costs.

[4] The facts leading up to the dispute are in the main not in dispute. On the 17 of February 2005, the Minister of Finance II confirmed the plaintiff's appointment effective 1 March 2005 for a period of two years and upon terms and conditions set out in the said letter (see p 76 to p 77 of bundle B), on the 25 March 2008 the Minister of Finance II by way of letter extended the tenure of the plaintiff as the non executive chairman of the first defendant upon the same terms and conditions, for a further period of one year ('selama satu tahun lagi') effective 1 March 2008 (see p 136 of bundle B) on the 3 May 2008, the Prime Minister of Malaysia at that time who was also the Finance Minister wrote to the plaintiff to inform the plaintiff that a new non-executive chairman of the first defendant would be appointed on the 1 June 2008. The plaintiff tendered his resignation as a director of the first defendant on the 17 June 2008 (see p 149 of bundle B). The plaintiff attempted to withdraw his resignation (p 144 of bundle B). The plaintiff himself wrote the board of the first defendant on the 26 May 2008 explaining the situation (p 141 of common bundle of documents).

[5] The plaintiff case is based on its pleadings in particular paras 6, 7 and 8 of the statement of claim ie the plaintiff tenure as the non-executive chairman of the first defendant should not have been terminated before 28 February 2009. A careful look at the letter written by the Minister of Finance Malaysia (p 137 common bundle of documents) clearly states the plaintiff remains as chairman till 31 May 2008 and I set out the letter below:

MENTERI KEWANGAN MALAYSIA

KK/BMKD(S)23/727/689/2 Jd.2

23 Mei 2008

SULIT DAN PERSENDIRIAN

Y.Bhg. Tan Sri Adam Kadir

Pengerusi

Pos Malaysia Berhad

Tingkat 33, Menara Dayabumi

Jalan Sultan Hishamuddin

50050 KUALA LUMPUR

Penghargaan di Atas Perkhidmatan Sebagai Pengerusi Bukan Eksekutif Pos Malaysia Berhad

Saya ingin mengambil kesempatan ini untuk merakamkan ucapan setinggi-tinggi penghargaan dan terima kasih di atas perkhidmatn dan sumbangan yang telah Y.Bhg Tan Sri berikan sebagai Pengerusi Bukan Eksekutif, Pos Malaysia Berhad mulai 1 Mac 2005 hingga 31 Mac 2008. Pengerusi Bukan Eksekutif baru akan dilantik mulai 1 Jun 2008.

Sekian, terima kasih.

Salam hormat,

t.t.

(DATO' SERI ABDULLAH AHMAD BADAWI)

[6] It is clear the second letter of renewal of the plaintiff as non-executive chairman of the first defendant was for a period of one year more. To suggest that this implies a contractual duty to continue the plaintiff appointment until February 2009 is not borne out by the contemporaneous letters referred. The claim of breach of contract should fail.

[7] Be that as it may I considered the question whether the proper party was before the court. To determine this question, the court would here had to look at the articles of association of the first defendant. These articles (found in p 17 to p 75 of common bundle of documents) in particular article 129 vests the power to appoint a chairman in the special shareholder. This power does not carry with it a power to remove the chairman as opposed to article 109 (p 58 common bundle of documents) where the special shareholder has the power to remove directors. The definition of special shareholder in the articles (p 30 of common bundle documents) is defined as set out below:

> Special shareholder means the Minister of Finance (Incorporated) a body corporate established under the Minister of Finance (Incorporated) Act 1957 (Amended 1989) or its successors or any Minister, representative or any person acting on behalf of the Government of Malaysia.

[8] The Minister of Finance (Incorporated) is a legal fiction that in co-operates the Finance Minister pursuant to Act 375 Minister of Finance (Incorporation) Act 1957. The entitlement of the Act reads 'An Act to in co-operate the Minister Charged with responsibility for finance'. The Minister of Finance becomes a body corporate and is referred to as the corporation (see s 3 of the Act). This is a common feature in many government controlled companies, where through the role of Ministry of Finance Incorporated as a special shareholder, the important corporate personalities in these companies could be controlled by the Ministry of Finance in view of its investments in these companies. I find it remarkable that this act which is now the cornerstone of government controlled companies ('GLCs') would have been thought about by the founding fathers of this nation as early as 1957 having the foresight to provide for positive intervention by the government in the corporate field.

[9] In my view it does not matter whether relevant letters were signed by the Minister of Finance or that the corporation is under the direction and control of the Minister of Finance but as long as the Act is in force, the minister acts as a corporation and any contractual privity (if at all) must be with the corporation not the Minister or the Government of Malaysia (see ss 3 and 4 of the Act).

[10] I find support for this view in the decision of the Privy Council in *International Railway Co v Niagara Parks Commission* [1941] 2 All ER 456 a case dealing with the question the commission being a corporate body and whether it could be sued. See the judgment of Luxmoore LJJ pp 5–7 and I quote:

> The Act of incorporation plainly constitute the commission as a corporation with a separate legal entity, and in some, at any rate, of its powers it was obviously recognised that it would have contractual capacity separate from the Crown — eg, the power to make itself responsible for the moneys secured by debentures issued under the Act for it is provided that the repayment of the moneys secured by the debentures 'may be guaranteed by the Crown'. This provision would be meaningless if the commission was not to be under any liability in the first instance.
>
> The Court of Appeal for Ontario also appears to have ignored these important words, for there is no reference to them in the judgment of Mc Tague JA with which the other members of the Court of Appeal for Ontario agreed Kelly J in his judgment referred to the commission, not only as being the agent or servant of the Crown, but also as 'an emanation of the Crown' The latter phrase is also used by Mc Tague JAA. Their Lordships are unable to appreciate the precise meaning intended to be attributed to this phrase by the courts below. If it is intended to refer to the commission in some capacity other than that of agent or servant, it is impossible to ascertain from the judgments delivered what the legal significance of that capacity may be. The word 'emanation' is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is 'that which issues or proceeds from some source, 'and it is commonly used to describe the physical properties of substances (eg

Radium) which give out emanations of recognisable character. The words seem first to have been used by Day J in *Gilbert v Trinity House Corpn*. In his judgment in that case, Day J said, at p 801:

> 'The Trinity House, to my mind, is not in the position of a great officer of state. It is nothing more than an amalgamation by authority of state of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of state are, if I may say so, emanations from the Crown. They are delegations by the Crown of its own authority to particular individuals. That is not the case with the Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in no sense an emanation from the Crown, nor in any way whatever a participant of any royal authority.'

The judge in the passage quoted seems to use the word as synonymous with servant or agent, and in no other sense. Their Lordships are of opinion that it would avoid obscurity in the future if the words 'agent or servant' were used in preference to the inappropriate and undefined word 'emanation'.

[11] I also refer to the decision of the Court of Appeal in *Tamlin v Hannaford* [1949] 2 All ER 327, and the judgment of Lord Denning at p 2 of the judgment and I quote:

> The Transport Act 1947, brings into being the British Transport Commission, which is a statutory corporation of the kind comparatively new to English law. It has many of the qualities which belong to corporations of other kinds to which we have been accustomed. It has, for instance, defined powers which it cannot exceed, and it is directed by a group of men whose duty it is to see that those powers are properly used. It may own property, carry on business, borrow and lend money, just as any other corporation may do, so long as it keeps within the bounds which Parliament has set, but the significant difference in this corporation is that there are no shareholders to subscribe the capital or to have any voice in its affairs. The money which the corporation needs is raised, not by the issue of shares, but by borrowing, and its borrowing is not secured by debentures, but is guaranteed by the Treasury. If it cannot repay, the loss falls on the consolidated fund of the United Kingdom, that is to say, on the taxpayer. There are no shareholders to elect the directors or to fix their remuneration. There are no profits to be made or distributed. The duty of the corporation is to make revenue and expenditure balance one another, taking, of course, one year with another, but not to make profits. If it should make losses and be unable to pay its debts, this property is liable to execution, but it is not liable to be wound-up at the suit of any creditor. The taxpayer is the universal guarantor of the corporation. But for him it could not have acquired its business at all, nor could it now continue it for a single day. It is his guarantee that has rendered shares, debentures and such like all unnecessary. He is clearly entitled to have his interest protected against extravagance or mismanagement.

There are other persons who have also a vital interest in its affairs. All those who use the services which it provides — and who does not–and all whose supplies depend on it–in short, everyone in the land-is concerned in seeing that it is properly run. The protection of the interests of all these-taxpayer, user and beneficiary is entrusted by Parliament to the Minister of Transport. He is given powers over this corporation which are as great as those possessed by a man who holds all the shares in a private company, subject however, as such a man is not, to a duty to account to Parliament for his stewardship. *It is the Minister who appoints the directors—the members of the commission—and fixes their remuneration. They must give him any information he wants, and lest they should not prove amenable to his suggestions as to the policy they should adopt, he is given power to give them directions of a general nature in matters which appear to him to affect the notional interest, as to which he is the sole judge, and they are then bound to obey. These are great powers, but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders or even of a sole shareholder. In the eye of the law the corporation is its own master and is answerable as fully as any other person or corporation.* It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants, and its property is not crown property. It is as much bound by Acts of Parliament as any other subject of the King. It is, of course, a public authority and its purposes, no doubt, are public purposes, but it is not a government department nor do its powers fall within the province of government.

[12] In my view, it ever there was a contract between the plaintiff as pleaded, it should be with the Minister of Finance Incorporated ('MOF Inc') and since the corporation is not a party in this suit, the plaintiff claim should stand dismissed. Counsel for the plaintiff argues the definition of special shareholder includes the minister, representative or any person acting on behalf of the Government of Malaysia. I am of the view, the said Act is clear and the Minister acts as a corporation and such an interpretation of the clause in the articles would defeat the provisions of the said Act and cannot be sustained. I therefore find the plaintiff's contract it any is with the MOF incorporated and therefore since MOF incorporated is not a party to the action, the claim should stand dismissed.

[13] As to whether when being appointed by the special shareholder, there could arise a contract as pleaded by the plaintiff. I am of the view a shareholder cannot in law be capable of creating contractual liability with the plaintiff in connection with the plaintiff's appointment as chairman and director of the first defendant. The power to appoint a chairman under the articles does not create a contract between the plaintiff and the special shareholder. In this case the plaintiff actually, resigned from the board of the first defendant. The plaintiff could have stayed on as chairman beyond May 2008 but didn't. The defendant appointment is subject to the articles of association of the first defendant and is bound by its terms.

[14] With regards to the doctrine of expectation, I do not find merit in the

argument and I rely on the dictum of His Lordship Hishamuddin J in the Court of Appeal decision in *Tenaga Nasional Bhd v Manfield Development Sdn Bhd & Anor* [2010] MLJU 1831 and I quote:

> For the purpose of determining as to whether or not there is a concluded contract between the plaintiffs and the defendant, an important factor that has to be taken into account is whether the defendant had accepted the AACC's valuation (and in the present case the defendant had not); and not whether the Government of Malaysia had accepted AACC's valuation. The proposed purchaser in the proposed transaction is the defendant, and not the government. Although the government has so indirect control over the defendant thought its nominees on the board of the defendant, yet as a matter of strict law Tenaga Nasional Bhd (the defendant/appellant) is a separate legal entity from the Government of Malaysia. As a company, the defendant has its own board of directors who owes a fiduciary duty and is accountable to the shareholders; and the company is subject to the Companies Act 1965 and to legal principles concerning corporate governance. It cannot just obey the directive of the government blindly. *Perhaps in the past there might had been occasions where the defendant had abided by the directives of the government on matters pertaining to commercial dealings of the defendant with private entities. But in those situations, unless such a directive is clearly pursuant to a specific statutory provision, compliance with the government's directives was* merely out of deference for the government, and not as a matter of a legal obligation. In the present case, in respect of the commercial dealing or transaction of the defendant with the plaintiffs, the government cannot legally make a decision on behalf of the defendant. And where the board of directors of the defendant had made a decision to reject AACC's recommendation and to withdraw the indicative non-binding offer, and giving reasons for doing so, the government must respect that decision.

[15] For all these reasons, I answered the first and fourth issues in the negative and found that there was no contract between the plaintiff and second and third defendants and I dismissed the plaintiff's claim NCVC18 with costs and as agreed I dismissed NCVC99 with costs and, as a postscript the plaintiff's claim if any is still at large against Ministry of Finance Incorporated.

Plaintiff's claim dismissed with costs.

Reported by Kanesh Sundrum